# TRADE REGULATION

## FAIR TRADE LAWS—NON-APPLICABILITY TO HORIZONTAL PRICE FIXING.

Substantially all the tobacco wholesalers of Ohio agreed to a schedule of minimum retail prices for competing brands of cigarettes. Form contracts, pledging adherence to the prices so set, were signed by numerous retailers upon distribution by individual wholesalers. When defendant drug store, a non-signer but with notice of the agreements, undersold these prices, plaintiff retailer sought injunctive protection. The judgment of the Common Pleas court granting the injunction was reversed by the Court of Appeals. In affirming the reversal, the Supreme Court of Ohio held that the contracts, in effect, constituted horizontal agreements and as such were illegal under Ohio Gen. Code Sec. 6402-6.[1] *Rayess* v. *Lane Drug Co.*, 138 Ohio St. 401, 20 Ohio Op. 514 (1941).

The universal clause in all fair trade acts condemning horizontal price fixing[3] may be likened to the prohibition in the National Industrial Recovery Act against monopolistic practices;[4] in both situations the probable purpose of inclusion was more to cushion a basic shift in anti-trust policy[5] than to condition the dynamics of the new legislative relaxation of the rigors of full competition. But despite this origin, Ohio G. C. §6402-6 and its counterparts are potentially available to counsel and courts for judicial braking of the drift toward price-fixing in distribution. As an instance of such judicial action, the principal case commands attention. On its face, it is true, the decision is limited in significance as an indicator of suc-

[1] This section provides "that this act shall not apply (in removing price fixing contracts from the operation of state anti-trust laws) to any contract or agreement between producers or between wholesalers or between retailers as to sale or resale prices.

[2] The Fair Trade laws, now enacted in 45 states, are alike in excepting horizontal contracts from the legality given to resale price maintenance.

[3] 48 STAT. 195, 196, National Industrial Recovery Act, Sec. 3a (2), provided, "that such codes are not designed to promote monopolies . . . that such codes shall not permit monopolies or monopolistic practices."

[4] Gulick, *Some Economic Aspects of the N. I. R. A.* (1933) 33 COL. L. REV. 1103, at 1145, remarks on this shift in philosophy. And see dissenting opinion in Ely Lilly Co. v. Sanders, 216 N. C. 163, 4 S. E. (2d) 528 (1939), for a discussion of the trend against the theories of the antitrust laws.

[5] In Frank Fischer Merchandising Corp. v. Ritz Drug Store, 129 N. J. Eq. 105, 19 A. (2d) 454 (1941), an agreement by manufacturers of two different products, permitting their sale, as a combination, at a fixed price was declared invalid. This agreement is obviously a much different type of horizontal price fixing than that of the principal case.

cessful modes of attack through the excepting clauses; the factual picture carried on its face an unmistakable mark of price-fixing on the horizontal level which would probably have induced a like judicial reaction in any other court. Yet it appears to be practically[6] the first decision wherein a court has declared a specific fact pattern to constitute a horizontal restraint, and suggests the possibilities for alert counsel in less obvious situations.

Eminent critics, though their opinions have been controverted by others,[6] testify to the fact that legislative tolerance of resale price maintenance greatly facilitates price restraints of a horizontal character.[7] Thus, under the aegis of protective legislation, organized retailers, chiefly through highly efficient fair trade committees, force manufacturer adoption of a standard mark-up for competing products.[8] Such procedure, which is far from uncommon,[9] rigidifies one of the large cost elements in price determination, and to that extent produces horizontal restraint. Disposition of several recent New York actions attests the possibilities pregnant in an attack built upon these premises. In these instances, an association of liquor retailers had, by threatening to boycott distiller brands, coerced the manufacturers into adopting an agreed-upon margin of 40 percent for all liquors. Supposedly, the prices were set by the vertical contracts signed by retailers; but yet, when confronted with the proposi-

[6] Among whom are SELIGMAN AND LOVE, PRICE CUTTING AND PRICE MAINTENANCE, (1932), p. 259-263.

[7] Thurman Arnold, Ass't Attorney-Gen'l. of U. S., has criticized resale price maintenance in "that it sanctions arrangements inconsistent with the anti-trust laws and becomes a cloak for many conspiracies in restraint of trade which go beyond the limits established in the amendment." 13 PROCEEDINGS OF THE T. N. E. C., VERBATIM RECORDS, 69. For a convincing discussion to the effect that horizontal collusion has been engendered by the Miller-Tydings Amendment (federal resale price maintenance law), see the memorandum of Corwin Edwards, Chief Economic Consultant for the Anti-Trust Dept. reprinted in VERBATIM RECORDS, *supra*, Vol. 13, p. 69. See also, *Final Report of T. N. E. C.* (1941) 33.

[8] For the view that prices so set tend to be uniform as to competing products since the retailers usually demand an identical mark-up (through the recommendation of Fair Trade committees with which most manufacturers negotiate) and so result in horizontal restraint, *see* 13 T. N. E. C. VERBATIM RECORDS, p. 206.

[9] A sales manager for a large drug company said, "The committees (Fair Trade) are not permitted, supposedly, by law to dictate what the minimum prices shall be, but they are doing just that by refusing to approve contracts containing prices which do not give the retailers what they consider a fair profit." Quoted in Nelson and Klein, *Price Behavior and Business Policy*, (1941) T. N. E. C. MONOGRAPH No. 1, at 88-89. The fact that editorials in the National Association of Retail Druggists Journals have repeatedly warned the retailers not to engage in boycotting or attempting to set the prices would seem to indicate the possible existence of such practices. See the issues of March 7, 1940, p. 325 and Jan. 6, 1940, p. 736.

tion that a horizontal combination existed, plaintiff association dropped its suits against the price cutters.[10]

Not only is there this contention that legitimization of resale price maintenance disburdens horizontal price restraints; it has been urged with equally strong authority that it is " . . . nearly always impossible for one manufacturer to establish a system of vertical price fixing unless he can be sure that his competitors will do likewise. Consequently, this type of horizontal collusion has been an indispensable part of the movement for resale price maintenance." [11] But despite such testimony that combination on this expressly forbidden plane often occurs as a means to effective realization of resale price maintenance, apparently a recent New Jersey decision [12] provides the only illustration, beyond the similar instant case, of counsel suggesting the possibility of vertical contracts cloaking an illegal combination. There, though the prices set were uniform in several hundred contracts, prepared by twelve different wholesalers, the court would not infer a horizontal restraint among the wholesalers in the absence of proof of an express agreement. This holding indicates the exactness of proof which may be required; nevertheless, the ruling of the Ohio court in the principal case may presage a renewed effort on the part of counsel and courts to uncover the existing illegality present in many Fair Trade contracts.

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[10] For a discussion of the cases and their implications, see *Trade Liquor War to the Finish,* (Sept. 23, 1940) TIME MAG. 69.

[11] Edwards, *supra* note 8, in 13 PROCEEDINGS OF T. N. E. C., VERBATIM RECORD (1940) 63. Equally strong is the judgment of GRETHER, PRICE CONTROL UNDER FAIR TRADE REGULATION (1939) 380.

[12] Pazen v. Silver Rod Stores, 129 N. J. Eq. 128, 18 A. (2d) 576 (1941).